that doing so would result in exaggerated environmental impacts and overstated risks, ensuring it could justify its proposed pre-emptive veto.

4. Fake Science

The BBWA cherry picked findings from reports prepared by environmental groups, known mining opponents, and discredited scientists that didn't meet basic scientific requirements.

EPA staffed the BBWA study so the analysis would lead to its single, preordained conclusion.

- EPA's Richard Parkin, an avowed Pebble opponent, was selected as BBWA team leader, even though he believed as early as 2010 that Pebble should be vetoed, and campaigned aggressively within the agency.
- Parkin even admitted that politics were an "as big or bigger factor" than science in evaluating Pebble.
- EPA installed Phil North as "technical lead" for the BBWA.

EPA relied heavily on disgraced hydrologist Ann Maest's biased reports.

- EPA incorporated hydrologist Ann Maest's work after meeting with her numerous times and noting her bias against Pebble.
- The second draft of the BBWA was released after Maest was forced to admit in federal court to having falsified scientific reports in other litigation.
- In this other litigation, the U.S. District Court for the Southern District of New York ruled that a $9.5 billion Ecuadorian judgment against Chevron, in which Ann Maest served as Plaintiff's #2 environmental consultant, was the product of fraud and racketeering activity the Plaintiff's legal team. Maest declared under oath, "I disavow any and all findings and conclusions in all my reports and testimony on the Equator Project."
- EPA covered up Maest's role by removing explicit citations to her work in the BBWA, but not the underlying information.

EPA sought out known anti-Pebble authors and contributors for the BBWA.

- EPA identified seven reports prepared by or for organizations publicly opposed to Pebble, and conducted a secret peer review of them.
- EPA chose Thomas Quinn as a BBWA contributor, despite having participated in numerous briefings in which he advocated strongly for a pre-emptive veto.
- EPA hired Alan Boraas to conduct subsistence and traditional use studies for the BBWA, despite having previously published several anti-Pebble editorials.
- EPA picked Phil Brna, a USFWS employee, to co-author a major appendix to the BBWA, despite his previously expressed excitement at the possibility

of a veto, stating: "[t]his [i.e., a decision barring Pebble] is going to happen and it's going to get bloody. I am looking forward to it!"

Each time the BBWA underwent a peer review, reviewers pointed out its serious shortcomings:

- "I find this report, by its nature, to be very biased."
- This report "is clearly intended to convince the reader that the Pebble Mine should not be permitted to operate" and "lacks impartiality."
- "[S]ome of the comments read like editorial opinions rather than reporting scientific results."
- One reviewer noted the BBWA's conclusions were "not appropriate for a document that is intended to provide a scientific and technical foundation for future decision making."
- Another concluded, "Although interesting, the potential reality of the assessment is somewhat questionable. It is also unclear why EPA undertook this evaluation, given that a more realistic assessment could probably have been conducted once an actual mine was proposed and greater detail about operational parameters available."

5. Fake Peer Review

EPA "validated" the BBWA with a highly orchestrated peer review where clear criticism was overlooked and pushed aside. Peer reviewers roundly condemned these studies as insufficiently supported by scientific evidence, methodologically flawed and biased.

EPA designed a peer review process that was contrary to its own regulations and guidelines so the many flaws in its BBWA study would remain hidden.

- In violation of its own guidelines, EPA had excessive contact with peer reviewers.
- EPA short-circuited the peer review process, limiting both oral and written submissions during public meetings.
- When the second draft of the BBWA expanded from 339 pages to 618, and included an entirely new hypothetical mine scenario, EPA ignored requests that it conduct a full peer review of the new document.
- EPA allowed peer reviewers to review only a limited set of materials in a limited amount of time, and permitted them to address only specific questions selected by EPA
- EPA ignored peer reviewers when they complained about the process and the insufficient time given for review.

EPA almost entirely ignored Pebble's extensive environmental baseline studies.

- Pebble's studies were the result of eight years of work by 35 professional organizations, comprising 27,000+ pages and about $150 million of

investment, and are the most complete environmental overview of the area surrounding Pebble.

6. Fake Consultation

Throughout, public feedback regarding the BBWA and EPA pre-emptive action has been overrun with an orchestrated effort to stuff the ballot box.

Mass comment campaigns run by donation seeking ENGOs and radical anti-development groups do not reflect the real sentiment of the public at large.

- The recent comment period on suspension of the withdrawal in fact garnered only12,421personal comments from individuals or groups (out of the 1.1 million total comments), and more than 2,900 of these individual comments came from anonymous submitters. This represents just 1.2% of all comments received.
- The vast majority of the most recent "comments" were generated by 53 donation-seeking ENGOs and radical resistance groups who generated comments from click-and-send form email tools.
- CREDO, an activist anti Trump resistance group, that uses its 5 million cell phone subscribers to take public action, alone generated 136,727 comments.
- The World Wildlife Fund, with more than one million members, had 291,491 people sign a one paragraph "comment" that failed to address any relevant issues identified in the most recent comment period.

Real and Broad Agreement of Wrongdoing by EPA

Time after time, independent investigations of EPA actions at Pebble have determined that the federal agency's conduct was biased and inappropriate.

The U.S. House Committee on Oversight and Government Reform concluded that "EPA employees had inappropriate contact with outside groups and failed to conduct an impartial, fact-based review of the proposed Pebble mine" and that the pre-emptive veto was "without legal basis."

Former U.S. Senator and Secretary of Defense William Cohen determined that the circumstances "raise serious concerns as to whether EPA orchestrated the process to reach a predetermined outcome; had inappropriately close relationships with anti-mine advocates; and was candid about its decision-making process."

A federal court in Alaska granted a preliminary injunction halting all EPA work on the 404(c) veto after seeing just a fraction of the evidence of EPA misconduct.

The U.S. House Committee on Science, Space, and Technology found EPA's actions rife with misconduct and "determined that the pre-emptive action taken for the Pebble

Mine Project was unprecedented under the Clean Water Act and was justified by a questionable assessment that relied on predetermined conclusions developed by EPA officials."

The committee found that "EPA employees inappropriately assisted outside groups in petitioning the agency to change the way they operate and use Section 404(c) to stop this project."

Committee Chair Lamar Smith concluded, "EPA employees colluded with third party Pebble Mine opponents. They sought to deliberately establish a record that pointed to one outcome: the Pebble Mine will be excluded from the regular permitting process and should be stopped."

THE pebble PARTNERSHIP

May 3, 2018

VIA ELECTRONIC MAIL

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Strengthening Transparency in Regulatory Science

Dear Administrator Pruitt,

I am writing to applaud you for proposing a new rule, "Strengthening Transparency in Regulatory Science," to bolster the quality of the science EPA uses in its decision-making. As EPA correctly observed in its Federal Register Notice, only the "best available science must serve as the foundation of EPA's regulatory actions." The proposed rule is a long-overdue step toward ensuring that the Agency is objective in its actions, especially when those actions can have far-reaching impacts. For too long, EPA has allowed ideology and agenda to drive its decisions. One unfortunate example of this is the previous Administration's decision to preemptively block development of the Pebble Project, a potential copper, gold, and molybdenum mine located in southwest Alaska, based on a scientific record that could never have survived the standards of the proposed rule. EPA's July 2014 Proposed Determination to block the Pebble Project was based exclusively on the Agency's deeply flawed and scientifically indefensible Bristol Bay Watershed Assessment ("BBWA"). Given the proposed rule and other efforts this Administration has taken to improve the Agency's science-based decision-making, the Proposed Determination should be immediately withdrawn, and the procedures mandated in the Clean Water Act and National Environmental Policy Act should advance pursuant to EPA's renewed commitment to using the best science in support of its decision-making.

The proposed rule will apply to "those studies that are pivotal to the action being taken," including "assessments . . . that provide the basis for EPA final significant regulatory decisions." The BBWA forms the entire basis for EPA's Proposed Determination regarding the Pebble Project, meaning that it would fall within the coverage of the proposed rule. For the reasons explained below, the Proposed Determination should be withdrawn because its reliance on the BBWA violates both the letter and spirit of the proposed rule.

The BBWA is Not Based on Transparent Science

Both the drafting process and scientific contents of the BBWA lacked transparency. Not only did EPA only approach like-minded anti-Pebble scientists and activists for contributions to

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the BBWA, but the report itself also rests on several unexplained assumptions that predictably led to shaky conclusions. As the Office of Management and Budget has recognized in its Guidelines for Ensuring the Quality, Objectivity, and Integrity of Information Disseminated by Federal Agencies, scientific transparency is not just an abstract ideal for agencies to appear to strive for: "The more important benefit of transparency is that the public will be able to assess how much an agency's analytic result hinges on the specific analytic choices made by the agency." As a result of EPA's obscured actions and analysis, the public has no opportunity to properly evaluate the BBWA as a basis for a major regulatory action.

Process. The BBWA process was marked not by transparency but rather by closed-door meetings with biased scientists and ignoring data showing that the Pebble Mine could comply with environmental standards. The BBWA could not be more antithetical to the proposed rule's goal to enhance "the transparency and validity of the scientific information." Rather than beginning with science, the BBWA began with EPA's preordained conclusion that the Pebble Project should be vetoed and included only the information that would support that end.

First, the BBWA process was marked by collusion with biased outside scientists and stacking the deck of authors and contributors with anti-Pebble ideologues, contrary to the proposed rule's call for "independence, transparency, clarity, and reproducibility." In 2010, an internal memorandum outlined the steps EPA could take to provide for the appearance of public involvement in a Pebble decision-making process to "deflect political backlash" and "derail opposition." EPA then developed a plan for creating its own scientific record through "information gathering and analysis . . . in order to support a decision to formally initiate [a Clean Water Act veto]." To do this, EPA officials communicated hundreds of times with anti-Pebble activists and scientists to share information, technical studies, and public relations strategies. One EPA employee even shared an outline of the BBWA with an anti-Pebble scientist a year before it was even announced. In particular, EPA became obsessed with a biased risk assessment conducted by The Nature Conservancy and scheduled several briefings to determine how that study could support EPA's efforts. By working closely only with those outside scientists aligned with EPA's anti-Pebble stance, the Agency was able to shut out those members of the scientific community who could have offered a more complete, independent picture of the Bristol Bay watershed and mining in general.

Science. Not surprisingly, the lack of transparency in the BBWA process resulted in similar opaqueness in its contents. The BBWA only describes potential *risk factors* with the mine construction and operations, but does not provide any information to quantify actual *cause-and-effect impacts* to specific habitat or to specific fish populations. There is no linkage between a perceived risk and a predicted impact; this is a significant deficiency and obscures the transparency, clarity, and reproducibility of the BBWA conclusions. An identified risk does not equate to an actual impact.

For example, the BBWA attempts to quantify lost anadromous stream miles, but the only metrics used to conclude unacceptable impacts are streams listed in the Alaska Department of Fish and Game ("ADF&G") Anadromous Catalogue and number of miles of stream affected. This is neither objective nor scientific: The fact that a stream is catalogued by ADF&G as anadromous does not mean the entire stream provides high-quality habitat or that it supports

large fish numbers. Accordingly, the basis for the BBWA conclusion of fish impacts is unscientific, unsupported by the data, and un-objective. EPA has grossly misrepresented the impacts without any reliance on empirical, transparent data.

Another example is the BBWA's estimates of seepage quantity and quality: There is no clear empirical basis for these parameters. Rather, they only reflect crude assumptions about the poor seepage collection rate and an assumed overestimate of uncollected seepage. This is unsubstantiated and does not reflect current modern mine seepage collection efficiencies. The net result is an un-objective and biased assertion of large seepage impacts that are not consistent with reality.

Furthermore, the BBWA's discussion of water quality impacts with respect to metals toxicity is unclear and not reproducible. There is no transparent linkage between theoretical dose-response models generated from laboratory research and real-world practical conditions in the identified streams. And worse, there is no linkage between estimated concentrations of metals and the magnitude of fish individuals and populations. All of these shaky, unexplained assumptions cast doubt on the validity of the BBWA's conclusions and underscore the need for the scientific transparency required by the proposed rule.

The BBWA is Not Based on the Best Available Science

Even where EPA's process and assumptions were not completely shrouded, the BBWA blatantly embraced shoddy and flawed science. If promulgated, the proposed rule will "strengthen[] the integrity of EPA's regulatory actions and its obligation to ensure the Agency is not arbitrary in its conclusions." Such a laudable goal is incompatible with continued reliance on the BBWA, the scientific contents of which guaranteed an arbitrary conclusion.

First, the BBWA analyzes hypothetical and implausible mine designs that do not reflect modern engineering or environmental standards. EPA knew that doing so would result in exaggerated environmental impacts and overstated risks, ensuring it could justify its preemptive action. For example, any mine of Pebble's size would necessarily involve compensatory mitigation, which EPA's hypothetical mines do not account for. Peer reviewers noted this weakness, stating that the overall utility of the BBWA was "questionable" because of the inherent uncertainty involved with studying hypothetical design plans.

Second, EPA carefully selected seven blatantly anti-mining studies and incorporated them into the BBWA after subjecting them to an unannounced peer review. The peer reviewers of these studies roundly condemned them as insufficiently supported by scientific evidence, methodologically flawed, and biased, stating:

- "[T]this report, by its nature, to be very biased."
- One report "is clearly intended to convince the reader that the Pebble Mine should not be permitted to operate" and "lacks impartiality."
- [S]ome of the comments read like editorial opinions rather than reporting scientific results."

EPA ignored the peer reviewers' warnings and continued to rely on the reports' contents in the BBWA. A co-author of two of the reports, Ann Maest, even admitted in the notorious *Chevron* litigation in Ecuador to having falsified scientific reports to sway the Ecuadorian courts to rule against the defendant development company. EPA's lone response to this admission was to remove explicit references to Maest's work in the final BBWA without changing any of its conclusions.

Third, and in stark contrast to its eagerness to incorporate questionable anti-mine science, EPA mostly ignored the most comprehensive Pebble Mine-related science available, Pebble's Environmental Baseline Document ("EBD"), a series of studies resulting from eight years of work by 35 professional organizations and comprising over 27,000 pages of data. Completed at a cost of over $150 million, the EBD is the most complete environmental overview of the area surrounding the Pebble Deposit that has been completed. One example of the EBD's potential utility to the BBWA is in demonstrating to EPA that the streams in the area surrounding the Pebble Deposit provide very poor physical-chemical-biological habitat conditions, and thus produce extremely low numbers or no fish at all. Despite this, and despite Pebble's repeated attempts to share the data with EPA, the BBWA only minimally incorporates its findings.

Finally, the BBWA does not address the economic potential of the Pebble Project at all. The proposed rule, based in part on Executive Order 13563, recognizes that grounding decisions on the best science "protects public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." The Pebble Project will create thousands of jobs and provide needed tax revenue to local, state, and national coffers. To ignore all evidence on this important aspect of a major development project fundamentally weakens any scientific value the BBWA could possibly have.

The BBWA's Peer Review Could Not Fix its Fundamental Shortcomings

As the proposed rule correctly observes, peer review "plays a critical role in independently validating key findings and ensuring that the quality of published information meets the standards of the scientific and technical community." The BBWA's peer review, however, practically ensured that such quality would ultimately be lacking. EPA designed a peer review process that was contrary to its own regulations and guidelines so the many flaws in its BBWA study would remain hidden. For example, EPA officials had excessive contact with peer reviewers during the review period and limited oral and written submissions during public peer review meetings. Several peer reviewers complained that the time given to review the Assessment was far too short to enable them to reach sound conclusions.

And the instructions given to the peer reviewers defied the proposed rule's requirement that EPA ask reviewers "to articulate the strengths and weaknesses of EPA's justification for the assumptions applied and the implications of those assumptions for the results." This is particularly the case with the BBWA's second draft, released in 2013. The second draft expanded by nearly 300 pages and introduced an entirely new hypothetical mine scenario. Despite this draft essentially being an entirely new study, EPA limited the peer review to asking only if the BBWA addressed concerns from the first draft of the BBWA, even as the peer reviewers and members of the public requested a full peer review of the document.

* * *

For all these reasons, the BBWA does not comply with the Information Quality Act's requirements that federal agencies maximize "the quality, objectivity, and integrity of information they create, collect, or disseminate." And the entire Pebble decision-making process has been marked by "arbitrary and capricious" actions prohibited by the Administrative Procedure Act. The proposed rule is thus sorely needed and should apply to the BBWA. But EPA can support the policies underlying the proposed rule – which the Agency admits have never been implemented "in a robust and consistent manner" – even before reviewing public comment on the proposed rule by withdrawing the Pebble Proposed Determination and moving forward with a commitment to scientific integrity.

Sincerely,

Tom Collier

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Legal Support for EPA Policy and Regulatory Changes to Clean Water Act Veto Authority

Introduction

The Trump Administration's infrastructure agenda, the *Legislative Outline for Rebuilding Infrastructure in America* ("Infrastructure Plan") includes a proposal to amend the federal Clean Water Act to "[e]liminate duplicative oversight by removing EPA's authority to veto a 404 permit under Section 404(c)." Infrastructure Plan at 42. While this would be a welcome statutory change for the regulated business community, the Administration can also effectively reform the 404(c) program without Congressional action. As this memorandum outlines, EPA can announce that it will no longer exercise its Clean Water Act veto authority because such a move (1) would be wholly within the EPA Administrator's statutory discretion and (2) would not constitute judicially reviewable agency action under the Administrative Procedure Act. EPA could also undertake concurrent rulemaking to limit EPA's regulatory authority under the Clean Water Act by:

(1) prohibiting vetoes initiated after the U.S. Army Corps of Engineers ("USACE") has granted a permit ("retroactive vetoes"); and

(2) clarifying that Section 404(c) vetoes may only be initiated when the preponderance of the evidence in a USACE-prepared environmental impact statement or environmental assessment in the permitting record establishes the likelihood of irreparable harm to aquatic resources.

These changes will codify a regulatory interpretation that accurately reflects EPA's limited authority under Section 404(c) and Congress's intent that 404(c) would be used only as a last resort after attempts to resolve objections with USACE have failed.

Analysis

Agency Discretion. Under both the Administrative Procedure Act and the Clean Water Act, a plaintiff may only challenge a *nondiscretionary* duty to obtain judicial review of an agency decision. *See* 5 U.S.C. 701(a) (granting a court jurisdiction to review actions taken by an agency except to the extent "agency action is committed to agency discretion by law"); 33 U.S.C. § 1365 (citizen suits may be brought where there is an alleged "failure ... to perform any act or duty under this Act which is not discretionary with the Administrator"). Section 404(c) of the Clean Water Act makes decisions whether to exercise the veto authority discretionary: The Administrator is "*authorized* to prohibit . . . and *authorized* to deny or restrict the use of any defined area for specification." 33 U.S.C. § 1344(c) (emphasis added). The Clean Water Act's implementing regulations contain similar discretionary language by stating that "the Administrator *may* exercise a veto over the specification by the U.S. Army Corps of Engineers." 40 C.F.R. § 231.1(a) (emphasis added).

Federal courts have held that EPA decisions not to pursue 404(c) vetoes are discretionary. In *Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Engineers*, 87 F.3d 1242 (11th Cir.1996), for example, the Eleventh Circuit held that the term

"authorized," as opposed to firmer terms such as "mandated," suggests a discretionary function and dismissed the case. 87 F.3d at 1249-50. Numerous courts have agreed with this reasoning. *See Hill v. Boy*, 144 F.3d 1446, 1449 n.7 (11th Cir. 1998) (upholding dismissal of citizen suit against EPA and USACE for failing to use their authority to veto the Corps' issuance of a section 404 permit because authority to veto a section 404 permit is discretionary); *City of Olmstead Falls v. EPA*, 266 F. Supp. 2d 718, 722-23 (N.D. Ohio 2003) (court lacked jurisdiction under Administrative Procedure Act to review EPA's decision not to veto USACE's decision to issue a Section 404 permit because the EPA's "veto power as set forth in Section 404(c) is discretionary").[1]

Because whether to initiate a Section 404(c) veto is solely within the Administrator's discretion, it follows that an announcement of EPA policy to refrain from threatening or initiating vetoes of 404 permits – and rulemaking limiting when and for what reasons the veto may be exercised – is an extension of this discretion and is non-reviewable. As the Seventh Circuit has observed, "judicial deference is particularly appropriate when the agency's policies or observations concern the exercise in future individual cases of unfettered agency discretion." *Am. Trucking Ass'n v. United States*, 755 F.2d 1292, 1298-99 (7th Cir. 1985). Because "the decision of the Administrator not to overrule the decision of the Army Corps is discretionary," these policy and regulatory changes are likewise discretionary. *Preserve Endangered Areas of Cobb's History, Inc.*, 87 F.3d at 1249.

A Policy Statement is Non-Reviewable Agency Action. An alternative ground for dismissal of a potential legal challenge is that the policy announcement does not constitute reviewable agency action under the Administrative Procedure Act. Announcing the new policy would not constitute a final decision on any individual permit. Although current EPA regulations state that the withdrawal of a proposed veto is final agency action, 40 C.F.R. § 231.5(c),[2] there is ample reason to believe that courts would find judicial review of a general policy announcement to be premature. For a decision to be reviewable, it "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016). The policy announcement is not reviewable because it is "not finally determinative of the issues or rights to which it is addressed, and does not establish any norms binding on [EPA]." *Secs. Indus. & Finan. Markets Assoc. v. U.S. Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 425 (D.D.C. 2014). Within the Clean Water Act permitting context, the Sixth Circuit recently held, "In the absence of any decision from either agency to ultimately deny or grant the permit, however, we have nothing to review." *Marquette Cnty. Road Comm'n v. EPA*, 2018 WL 1388541, *4 (6th Cir.

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[1] Other courts have stated in dicta that a decision to pursue a veto is discretionary. *See Mingo Logan Coal Co. v. EPA*, 70 F. Supp. 3d 151, 166 (D.D.C. 2014) (noting "section 404(c) contains *permissive, discretionary* language") (emphasis added); *Ctr. for Biological Diversity v. United States Army Corps of Engineers*, No. CV 14-1667, 2015 U.S. Dist. LEXIS 76653 at *8 (C.D. Cal. Feb. 4, 2015) (EPA "has the *discretionary* authority to veto that decision if it makes certain findings regarding the adverse effects of the permitted action.") (emphasis added).

[2] For the purposes of this memorandum, we assume that an announcement of EPA policy to refrain from Clean Water Act vetoes would include a directive to Regional Administrators to withdraw pending proposed vetoes.

March 20, 2018). Because the announced policy would not directly impact the granting or rejection of any permit, courts hearing any potential challenge would similarly have nothing to review.

Advantages of Revising 404(c) Regulations

While a statement of policy to refrain from exercising Clean Water Act vetoes would be an appropriate use of EPA discretion, a future administration could quickly reverse the policy. In the absence of Congressional action to amend the Clean Water Act, EPA can promulgate regulations clarifying the standard for issuing a veto and ensuring that such decisions are made after USACE has had a full opportunity to review the permit application and not after the Corps has already issued a permit. In particular, EPA can propose the following changes to its Clean Water Act regulations to better preserve this interpretation for the future:

- EPA will define the Clean Water Act's standard of "unacceptable adverse effect," 28 U.S.C. § 1344(c), to mean "impact on an aquatic or wetland ecosystem which is likely to result in *irreparable* degradation of municipal water supplies (including surface or ground water) or *irreparable* loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas" (amending 33 C.F.R. § 231.2(e));

- EPA Regional Administrators may initiate – and the EPA Administrator may finalize – a 404(c) action only upon concluding, based on a preponderance of the evidence in the environmental impact statement or environmental assessment developed by USACE and any cooperating agencies in the permitting record, that unacceptable adverse effects will result from a proposed dredge or fill activity (amending 33 C.F.R. § 231.3(a) & 231.6);

- The procedures for the resolution process under Section 404(q) of the Clean Water Act will be exhausted prior to any final decision of whether to initiate a 404(c) proceeding; and

- If 404(c) action is initiated, such action can be terminated, withdrawn, or rescinded at any time. However, a final determination to restrict or withdraw any site cannot be issued until after the final National Environmental Policy Act document in support of the permit action (either an environmental impact statement or environmental assessment) in support of the permit action and a proposed 404 permit decision are issued by USACE.

A future administration could modify or repeal these regulations, but that would be a longer process requiring notice and comment. There may also be little political will to change regulations that merely constrain the timing of and specific standards for 404(c) action, even in a Democratic administration.

Procedural Regulatory Changes Should Not Be Justiciable. Although the proposed regulatory change could be subject to challenge under the APA once finalized, it is difficult to conceive of how a litigant would be harmed by such a regulatory change so as to be able to support standing. In other words, even if a court found the final rule to be reviewable under the Administrative Procedure Act, the case would likely be dismissed for lack of standing since the

rule is procedural does not impact any third parties' rights or interests, including whether a project proponent ultimately receives or is denied a permit. *See Warth v. Seldin*, 422 U.S. 490, 508 (1975) (plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical); *see also Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

Legal Support for Pre-emptive Ban. Even if a plaintiff could maintain standing, a challenge to the proposed regulations would face an uphill battle because the amendments would better align with Congressional intent under the Clean Water Act. As set forth in Section 404, which is explicitly and entirely about permits, USACE is authorized to issue permits "for the discharge of dredged or fill material into the navigable waters at *specified* disposal sites." 33 U.S.C. § 1344. It is the developer's permit application that specifies the proposed disposal sites. EPA's authority is narrow and must be based on a permit application, as the statute only allows the Agency to "prohibit the *specification*" or "deny or restrict the use of any *defined area* for *specification*." *Id.* (emphasis added). And, critically, EPA can only take this action after determining that the discharge "into *such area*" will have an unacceptable adverse effect on the environment. *Id.* (emphasis added). Thus, the statute only allows EPA to act based on information about specified disposal sites, which are proposed by the developer in its permit application.

This reading is confirmed by both the Act's legislative history and EPA's own past practice. When Congress enacted the Clean Water Act, it expressly declined to give EPA complete authority over the issuance of permits, dividing up responsibilities between EPA and the Corps. The Senate Debate on the Conference Report contemplated that there would be a permit application before any 404(c) action "because *the permit application* transmitted to [EPA] for review will set forth *both the site to be used and the content of the matter of the soil to be disposed*." *Senate Consideration of the Report of the Conference Committee* (Oct. 4, 1972), *reprinted in* 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 161, 177, Cong. Research Serv. (Jan. 1973) (emphasis added). And the United States Supreme Court has agreed, concluding that the Clean Water Act "gives EPA authority to 'prohibit' *any decision by the Corps* to issue a permit for *a particular disposal site*." *Coeur Alaska Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 274 (2009) (emphasis added).

In addition to this history, EPA's practice over the last 40 years confirms that the issuance of a preemptive veto is unsupported. EPA has only exercised its authority under Section 404(c) thirteen times.[3] In each instance, EPA invoked Section 404(c) only after receipt

[3] *See* Chronology of 404(c) Actions, EPA (Sept. 23, 2013), https://archive.epa.gov/water/archive/web/html/404c.html. The sole instance in which EPA vetoed a project that had not yet filed a 404 application occurred in Florida in 1988, when an agricultural developer had proposed substantially similar development proposals on three adjacent plots of land. The proponent filed development plans for all three sites and permit applications for two of them. When EPA moved to veto the Corps' pending 404 permit for the first two projects, it vetoed the third at the same time because it deemed them to have the same characteristics as the other two properties. *See* The Cohen Group, *Report of An Independent Review Of The United States Environmental Protection Agency's Actions In Connection With Its*